

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

CHARLES WILKERSON,

Petitioner,

28 USC § 2254

vs.

DKT No. \_\_\_\_\_

COMMONWEALTH OF MASSACHUSETTS,  
DANIEL F. CONLEY, ATTORNEY GENERAL,

Plaintiff.

NOW COMES, Charles Wilkerson, Petitioner, Pro-se,  
seeks a Writ of Habeas Corpus Pursuant to 28 USC § 2254  
based on the grounds that his conviction was obtained in  
violation of his U.S.Const. § 5th Amend. Rights to Due  
Process, U.S.Const. § 6th Amend. Rights to effective  
assistance of counsel, and involuntarily guilty plea.

STATEMENT OF JURISDICTION

This is an appeal from an 6th, day of June, 2002,  
final judgment of conviction. Petitioner had done with  
respect to presenting issues to State Court, where he  
had properly presented his claim to the state's highest  
court, and thus fact that collateral relief might be  
available under state law was immaterial. This District  
Court has subject matter jurisdiction under 28 USC §  
2254 to entertain this habeas corpus petition.  
Picard v. Conner, 404 US 270, 275-277 (1971).

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REV 6/82PETITION UNDER 28 USC § 2254 FOR WRIT OF  
HABEAS CORPUS BY A PERSON IN STATE CUSTODY

United States District Court		District MASSACHUSETTS
Name CHARLES WILKERSON	Prisoner No. 22166-038	Docket No.
Place of Confinement FEDERAL CORRECTIONAL INSTITUTION RAY BROOK		
Name of Petitioner (include name upon which convicted)  CHARLES WILKERSON		Name of Respondent (authorized person having custody of petitioner)  V. COMMONWEALTH OF MASSACHUSETTS
The Attorney General of the State of: MASSACHUSETTS, DANIEL F. CONELY, ATT.GEN		
PETITION		
1. Name and location of court which entered the judgment of conviction under attack <u>DORCHESTER DISTRICT</u> <u>COURT</u>		
2. Date of judgment of conviction <u>August 17, 1992</u>		
3. Length of sentence <u>Two (2) years suspended sentence</u>		
4. Nature of offense involved (all counts) _____ _____ _____		
5. What was your plea? (Check one) (a) Not guilty <input type="checkbox"/> (b) Guilty <input checked="" type="checkbox"/> (c) Nolo contendere <input type="checkbox"/> If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details: _____ _____		
6. Kind of trial: (Check one) (a) Jury <input type="checkbox"/> (b) Judge only N/A <input type="checkbox"/>		
7. Did you testify at the trial? Yes <input type="checkbox"/> No <input type="checkbox"/> N/A		
8. Did you appeal from the judgment of conviction? Yes <input checked="" type="checkbox"/> No <input type="checkbox"/>		

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9. If you did appeal, answer the following:

- (a) Name of court Dorchester District Court
- (b) Result Motion for new trial pursuant to Mass Crim.P. 30, was denied.
- (c) Date of result August 1, 2000
- (d) Grounds raised Trial Court failed to conduct an adequate colloquy.

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to this judgment in any court, state or federal?  
Yes ☒ No ☐

11. If your answer to 10 was "yes," give the following information:

- (a) (1) Name of court Commonwealth Appeals Court
- (2) Nature of proceeding Exhausted state remedies, begin federal procedure for review.
- (3) Grounds raised Defendant's guilty plea was not entered understandingly and voluntarily, and trial counsel (Mr. Tomasetti) failed to discuss the facts of the case with defendant, also failed to review the defense or discuss possible issues of suppression.
- (4) Did you receive an evidentiary hearing on your petition, application or motion?  
Yes ☒ No ☐
- (5) Result Commonwealth Ordered a decision denying motion for new trial.
- (6) Date of result may 1, 2002,
- (b) As to any second petition, application or motion give the same information:
- (1) Name of court Supreme Judicial (SJC) for the Commonwealth
- (2) Nature of proceeding Appeal from the decision of the Commonwealth Appeals Court

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(3) Grounds raised Defendant claims that trial counsel (Mr. Tomasetti)  
failed to discuss the facts of the case with him or review  
defenses or argue on his behalf.

(4) Did you receive an evidentiary hearing on your petition, application or motion?  
 Yes ☒ No ☐

(5) Result The Supreme Judicial Court (SJC) entered a Order denying  
further review.

(6) Date of result June 6, 2002

(c) As to any third petition, application or motion, give the same information:

(1) Name of court \_\_\_\_\_

(2) Nature of proceeding \_\_\_\_\_

(3) Grounds raised \_\_\_\_\_

N/A

(4) Did you receive an evidentiary hearing on your petition, application or motion?  
 Yes ☐ No ☐

(5) Result \_\_\_\_\_

(6) Date of result \_\_\_\_\_

(d) Did you appeal to the highest state court having jurisdiction the result of action taken on any petition, application or motion?

(1) First petition, etc. Yes ☒ No ☐

(2) Second petition, etc. Yes ☒ No ☐

(3) Third petition, etc. Yes ☒ No ☐

(e) If you did *not* appeal from the adverse action on any petition, application or motion, explain briefly why you did not:

12. State *concisely* every ground on which you claim that you are being held unlawfully. Summarize *briefly* the *facts* supporting each ground. If necessary, you may attach pages stating additional grounds and *facts* supporting same.

CAUTION: In order to proceed in the federal court, you must ordinarily first exhaust your available state court remedies as to each ground on which you request action by the federal court. If you fail to set forth all grounds in this petition, you may be barred from presenting additional grounds at a later date.

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For your information, the following is a list of the most frequently raised grounds for relief in habeas corpus proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you may have other than those listed if you have exhausted your state court remedies with respect to them. However, *you should raise in this petition all available grounds* (relating to this conviction) on which you base your allegations that you are being held in custody unlawfully.

Do not check any of these listed grounds. If you select one or more of these grounds for relief, you must allege facts. The petition will be returned to you if you merely check (a) through (j) or any one of these grounds.

- (a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily with understanding of the nature of the charge and the consequences of the plea.
- (b) Conviction obtained by use of coerced confession.
- (c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.
- (d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.
- (e) Conviction obtained by a violation of the privilege against self-incrimination.
- (f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.
- (g) Conviction obtained by a violation of the protection against double jeopardy.
- (h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impaneled.
- (i) Denial of effective assistance of counsel.
- (j) Denial of right of appeal.

A. Ground one: a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily with understanding of the nature of the charge and the consequences of the plea.  
Supporting FACTS (tell your story *briefly* without citing cases or law): The trial judge fail to engage a colloquy with defendant. In the same case the trial court committed reversible errors in denying petitioner motion for a new trial because there was no affirmative showing that his plea was made intelligently and voluntarily.

B. Ground two: i) Denial of effective assistance of counsel

Supporting FACTS (tell your story *briefly* without citing cases or law): Counsel Mr. Tomassetti committed errors by disregarding defendant's request to enter a jury trial. Instead he told petitioner that he could not try the case, but could get a suspended sentence. In addition Counsel Mr. Tomassetti also failed to discuss the facts of the case to petitioner, nor reviewed any defenses pertaining to the case, or discuss the search warrant that had resulted in the seizure of evidence. Therefore, making the plea of guilty in this matter involuntarily.

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- C. Ground three: d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.

Supporting FACTS (tell your story *briefly* without citing cases or law): Petitioner contends that the evidence that was found in his possession was planted on him by Police Officers. When counsel learned of petitioner's statements he refused to investigate petitioner's claims. Therefore, rushing petitioner into accepting a guilty plea. Counsel (Tomasetti) also failed to investigate the validity of the arrest warrant in this matter.

- D. Ground four \_\_\_\_\_

Supporting FACTS (tell your story *briefly* without citing cases or law): \_\_\_\_\_

13. If any of the grounds listed in 12A, B, C, and D were not previously presented in any other court, state or federal, state *briefly* what grounds were not so presented, and give your reasons for not presenting them: \_\_\_\_\_

14. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack?  
Yes ☐ No ☒

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:

(a) At preliminary hearing Attorney Tomasetti A. Paul

78 Main Street, Watertown, Massachusetts 02172

(b) At arraignment and plea Attorney Tomasetti A. Paul

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REV 6/82(c) At trial N/A(d) At sentencing Attorney Tomasetti(e) On appeal Attorney John F. Palmer24 School Street, Suite 400 Boston, Mass 02108(f) In any post-conviction proceeding Attorney Joshua R. Weinberger136 Warren Avenue, Brockton, Mass 02303(g) On appeal from any adverse ruling in a post-conviction proceeding Attorney Joshua R. Weinberger136 Warren Avenue, Brockton, Mass 02303

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time?

Yes ☐ No ☒

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?

Yes ☐ No ☒

(a) If so, give name and location of court which imposed sentence to be served in the future: \_\_\_\_\_

(b) Give date and length of the above sentence: \_\_\_\_\_

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?

Yes ☐ No ☒

Wherefore, petitioner prays that the Court grant petitioner relief to which he may be entitled in this proceeding.

\_\_\_\_\_  
Signature of ~~Attorney~~ (if any)

I declare under penalty of perjury that the foregoing is true and correct. Executed on

8-2-04  
(date)Charles W. Wilson  
Signature of Petitioner

CERTIFICATE OF SERVICE

I, Charles Wilkerson hereby certify that a true and correct copy of the foregoing motion was mailed this 2 day of August, to Daniel F. Conley District Attorney, One Bulfinch Place, Boston, Massachusetts 02114.

  
Charles Wilkerson  
Pro se

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

DORCHESTER DISTRICT COURT  
NO. 9207CR06338

COMMONWEALTH

v.

CHARLES WILKERSON,  
Defendant

MOTION FOR NEW  
TRIAL PURSUANT TO  
MASS. R. CRIM. P. 30(b)

Now comes defendant and moves this Honorable Court to vacate the convictions, allow defendant to withdraw his admission to sufficient facts, and to grant him a new trial. See Massachusetts Rules of Criminal Procedure, Rule 30(b).

As grounds for this motion, defendant states that his admission to sufficient facts was not voluntarily, knowingly, and intelligently made, and was otherwise constitutionally defective, so that justice may not have been done.

In further support of this motion, defendant has attached hereto Affidavits and a Memorandum.

CHARLES WILKERSON  
By his attorney:

John F. Palmer  
Law Office of John F. Palmer  
14 School Street, Suite 400  
Boston, MA 02108  
(617) 723-7010  
BBO # 367980

JUN 14 2001

I HEREBY CERTIFY THAT THIS IS A  
COPY, GIVEN UNDER MY HAND AND  
THIS DAY OF

Clerk-Magistrate

CLERK-MAGISTRATE  
ASSISTANT CLERK

*8/3/00*  
*General*  
*An the very late (5/10/93) defendant charged*  
*he received this sentence to another case #9207JC0343.*  
*apparently pleaded to another session to the*  
*at the Dorchester court house there.*  
*he had appealed a prior case to the*  
*jury session and defaulted in this case.*  
*he also defaulted on this case.*  
*while the defendant probably did*  
*not get a full colloquy on this point.*  
*case, he was advised of his rights.*  
*to appeal that right in the*  
*chick and disposed of a case*  
*and the jury session.*  
*On 5/10/93 he took on*  
*is mos. committed sentence and a*  
*in the suspended sentence on the*  
*case.*

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

DORCHESTER DISTRICT COURT  
NO. 9207CR06338

COMMONWEALTH )

v. )

CHARLES WILKERSON,  
Defendant )

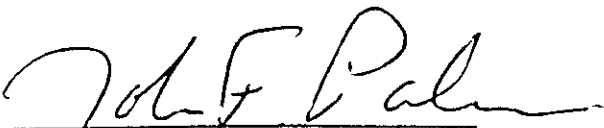
MOTION FOR NEW  
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CHARLES WILKERSON  
By his attorney:

  
\_\_\_\_\_  
John F. Palmer  
Law Office of John F. Palmer  
24 School Street, Suite 400  
Boston, MA 02108  
(617) 723-7010  
BBO # 367980

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

DORCHESTER DISTRICT COURT  
NO. 9207CR06338

COMMONWEALTH )  
 )  
v. )  
 )  
CHARLES WILKERSON, )  
Defendant )

AFFIDAVIT OF JOHN F.  
PALMER IN SUPPORT  
OF MOTION FOR NEW TRIAL

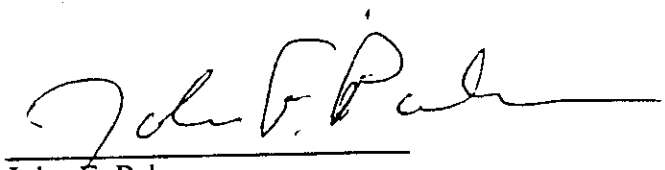
I, John F. Palmer, do hereby depose as follows:

1. I am an attorney licensed to practice law within the Commonwealth of Massachusetts.
2. In conjunction with my investigation into the defendant's Motion For New Trial, I attempted to obtain the tape recording of the plea colloquy but was informed that the tape was no longer available.
3. I spoke with Attorney Tomasetti, who was appointed to represent the defendant and he had no recollection of the proceedings before the Court in which defendant admitted to sufficient facts.

SIGNED UNDER THE PAINS AND PENALTIES OF PERJURY.

DATED:

2/14/00

  
John F. Palmer

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

DORCHESTER DISTRICT COURT  
NO. 9207CR06338

COMMONWEALTH )  
 )  
v. )  
 )  
CHARLES WILKERSON, )  
Defendant )

AFFIDAVIT OF CHARLES  
WILKERSON IN SUPPORT  
OF MOTION FOR NEW TRIAL

I, Charles Wilkerson, do hereby depose as follows:

1. I am the defendant charged in this case. I am presently incarcerated at the Plymouth House of Corrections in Plymouth, Massachusetts. I am twenty-four (24) years old (d.o.b. 7/28/75).

2. I was arrested for these offenses on August 17, 1992. I was arraigned in Dorchester District Court on August 18, 1992, and released on bail.

3. I was defaulted on this case on September 30, 1992.

4. On May 10, 1993, I was brought before the Court on the default warrant. Attorney Tomaselli was appointed to represent me.

5. I had a brief conversation with Mr. Tomasetti in the lockup in which he told me that he could not try the case, but that he could get me a suspended sentence. He did not discuss the facts of the case, review any defenses to the case, or discuss the search warrant that had resulted in the seizure of evidence.

6. I was subsequently brought into the courtroom where the prosecutor told the judge that there was an agreement.

7. I was asked if I understood the charges to which I was pleading guilty. I was not asked or told about the right to jury that I was waiving, i.e., that the jury is made up of members of the community, that I could participate in their selection, that their verdict must be unanimous, that the jury decides the facts, and the judge rules on the law and imposes sentence if found guilty.

8. My admission to sufficient facts was not voluntary or intelligent because I was not fully advised of my constitutional right to a jury trial.

9. My admission to sufficient facts was not voluntary because I thought that if I did not plead guilty and claimed my right to a trial or jury trial, I would have to remain in jail.

Signed under the pains and penalties of perjury.

  
Charles Wilkerson

Dated: 2-10-00

## COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

DORCHESTER DISTRICT COURT  
NO. 9207CR6338COMMONWEALTH

v.

CHARLES WILKERSON,  
DefendantMEMORANDUM IN  
SUPPORT OF MOTION  
FOR NEW TRIAL

The defendant seeks to vacate his convictions and to be granted a new trial, where his admission to sufficient facts was not voluntarily and intelligently made and where the Court failed to conduct an adequate colloquy regarding the waiver of the right to jury trial. See Commonwealth v. Duquette, 386 Mass. 834, 841(1982); Commonwealth v. Mele, 20 Mass. App. Ct. 958(1985). Ciummei v. Commonwealth, 378 Mass. 504, 509(1979).

A challenge to the validity of an admission or a guilty plea is properly made by a motion for a new trial, Commonwealth v. Huot, 380 Mass. 403, 406(1980). Indeed, a motion for a new trial is "the only avenue for direct appellate review of the validity of [a] guilty plea". Commonwealth v. De La Zerda, 416 Mass. 247, 250(1993). Such a motion may be filed "at any time". Mass R. Crim. P. 30(b). The burden is on the Commonwealth to show from the contemporaneous record that a challenged guilty plea or admission to sufficient facts was understandingly and voluntarily made. Commonwealth v. Duquette, supra at 841; Commonwealth v. Foster, 369 Mass. 100, 108 n.7(1985). If the Commonwealth fails to make such a showing, the plea "must later be set aside," Commonwealth v. Foster, Id., since the court has "no discretion to deny a new trial". Commonwealth v. Penrose, 363 Mass. 677, 681(1973).

To assure the validity of guilty pleas and admissions this court has established colloquy requirements designed to assure that pleas are made voluntarily and intelligently. Commonwealth v. Duquette, supra at 485. The record of the colloquy must demonstrate that the judge advised the defendant that, in pleading guilty or admitting to sufficient facts,

he waives his right to a jury or non-jury trial, his right to confront witnesses and his privilege against self-incrimination. Commonwealth v. Lewis, 399 Mass. 761, 764(1987). Moreover, the record must demonstrate either that the defendant was advised of the elements of the offense or that he admits facts constituting the unexplained elements. Henderson v. Morgan, 426 U.S. 637(1976); Commonwealth v. Colantoni, 396 Mass. 672, 678-679(1986).<sup>1</sup> Finally, the record must demonstrate that the defendant was pleading guilty or admitting to sufficient facts voluntarily and had not been threatened or unduly pressured. A “real probe of the defendant’s mind” is necessary in order that the colloquy not “become a ‘litany’, but [rather] attempt a live evaluation of whether the plea has been sufficiently meditated by the defendant with guidance of counsel, and whether it is not being extracted from the defendant under undue pressure”. Commonwealth v. Foster, supra at 107. Representations from counsel may not be substituted for questions from the court and responses from the defendant on the record. Commonwealth v. Pavao, 423 Mass. 798 802(1996) (“critical evidence for determining whether the [jury trial] waiver was made [must] come directly from the defendant in the colloquy”).

The Court in the Ciummei case, supra, announced a prospective rule, “in aid of sound judicial administration” that “a colloquy [with the defendant] shall be held in any instance of a waiver of the right to trial by jury”. Id. at 509. The colloquy was mandated in addition to the other formal requirements already existing for a jury waiver. See G.L. ch. 263, §6; Mass. R. Crim. P. 19(a). While not constitutionally based, the colloquy was deemed necessary to ensure that a defendant’s waiver of the right to jury trial was intelligent and voluntary. Ciummei v. Commonwealth, supra at 409. Although no specific script need be employed, a trial judge should, at a minimum, “advise the defendant of his constitutional right to a jury trial, and...satisfy himself that any waiver by the defendant is made voluntarily and intelligently”. Id. The judge should also “make sure that the defendant has conferred with his counsel about the waiver, and that he has not been

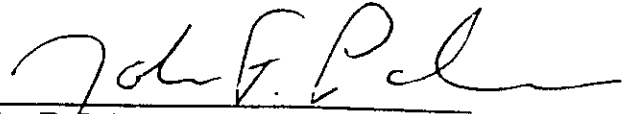
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<sup>1</sup> These constitutional requirements have been incorporated into Mass. R. Crim. P. 12(c)(3) and (5).

pressured or cajoled and is not intoxicated or otherwise rendered incapable of rational judgement". Id. at 510. In brief, "a defendant...must simply have indicated a comprehension of the nature of the choice". Id.

In summary, the court in accepting defendant's admissions in this case failed to conduct an adequate colloquy with defendant to ensure that his pleas were voluntarily and intelligently entered. He is thus entitled to the vacation of his convictions and a new trial.

CHARLES WILKERSON  
By his attorney:

A handwritten signature in black ink, appearing to read "John F. Palmer", written over a horizontal line.

John F. Palmer  
Law Office of John F. Palmer  
24 School Street, Suite 400  
Boston, MA 02108  
(617) 723-7010  
BBO # 367980

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

DORCHESTER DISTRICT COURT  
NO. 9207CR06338

COMMONWEALTH )  
 )  
v. )  
 )  
CHARLES WILKERSON, )  
Defendant )

NOTICE OF APPEAL

Now comes defendant and claims an appeal from the findings,  
rulings, and order of the court (Dolan, J.) entered on August 1, 2000,  
denying the defendant's Motion For New Trial.

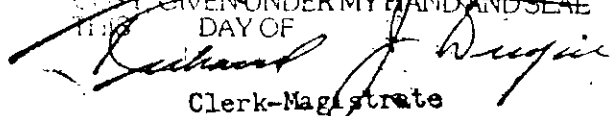
CHARLES WILKERSON  
By his attorney:



John F. Palmer  
Law Office of John F. Palmer  
24 School Street, Suite 400  
Boston, MA 02108  
(617) 723-7010  
BBO # 367980

JUN 14 2001

I HEREBY CERTIFY THAT THIS IS A TRUE  
COPY GIVEN UNDER MY HAND AND SEAL  
THIS DAY OF



Clerk-Magistrate

CLERK-MAGISTRATE  
ASSISTANT CLERK

**ADDENDUM**

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# GENERAL LAWS OF MASSACHUSETTS

## PART IV. CRIMES, PUNISHMENTS AND PROCEEDINGS IN CRIMINAL CASES.

### TITLE I. CRIMES AND PUNISHMENTS.

#### CHAPTER 263. RIGHTS OF PERSONS ACCUSED OF CRIME.

##### Chapter 263: Section 6. Conviction; manner; waiver of jury trial.

Section 6. A person indicted for a crime shall not be convicted thereof except by confessing his guilt in open court, by admitting the truth of the charge against him by his plea or demurrer or by the verdict of a jury accepted and recorded by the court or, in any criminal case other than a capital case, by the judgment of the court. Any defendant in a criminal case other than a capital case, whether begun by indictment or upon complaint, may, if he shall so elect, when called upon to plead, or later and before a jury has been impanelled to try him upon such indictment or complaint, waive his right to trial by jury by signing a written waiver thereof and filing the same with the clerk of the court. If the court consents to the waiver, he shall be tried by the court instead of by a jury, but not, however, unless all the defendants, if there are two or more charged with related offenses, whether prosecuted under the same or different indictments or complaints shall have exercised such election before a jury has been impanelled to try any of the defendants; and in every such case the court shall have jurisdiction to hear and try such cause and render judgment and sentence thereon. Except where there is more than one defendant involved as aforesaid, consent to said waiver shall not be denied in the district court or the Boston municipal court if the waiver is filed before the case is transferred for jury trial to the appropriate jury session, as provided in section twenty-seven A of chapter two hundred and eighteen.

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## RULES OF CRIMINAL PROCEDURE

## Rule 12

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P. 13(d)(1)(B),  
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of which the Commonwealth is required to be  
pursuant to Mass.R.Crim.P. 14(b)(1) and (2). See  
wealth v. Edgerly, Mass.Adv.Sh. (1977) 707, 361  
258; Blaisdell v. Commonwealth, Mass.Adv.Sh.  
1977, 361 N.E.2d 191.

the matters to be discussed under subdivision  
is the setting of the trial date. It must be  
that one consequence of a failure to comply with  
that the case will be *presumed* to be ready for  
trial date will be set for the earliest available time  
infra). Agreements as to subdivisions (D)(ii) and  
assist the court in the management of its docket, see  
P. 36(a)(2), and understandings as to the avail-  
of necessary witnesses will reduce the need for contin-  
to secure their attendance, Mass.R.Crim.P. 10. If  
of fact are agreed upon after discussion under  
they are to be recorded in the conference report (c)  
(A), (b)(2)(A), infra).

The defendant may also request information concerning  
Commonwealth's intended use of prior acts or convictions  
of knowledge, intent, or *modus operandi*, and use of  
convictions to impeach the testimony of the defendant.  
Information, while not specifically mentioned in Rule 11,  
proper subject of discussion at the pretrial conference.  
contemplated that compliance with this subdivision will  
the necessity for resorting to the more time-consuming  
procedures of Mass.R.Crim.P. 14 and 23, expedite the  
of testimony at the trial, and allow counsel to better  
are for trial.

Pursuant to Mass.R.Crim.P. 9(a)(3), either party may move  
consolidation of pending charges. This matter, if re-  
at conference, will avoid the time delay required for  
to conduct a hearing and to act upon a motion for  
This is true also as to motions to transfer other  
charges for plea, sentence, or trial. Mass.R.Crim.P.  
1-2).

It should be noted that a motion to take a deposition, not  
contemplated within subdivision (a)(1) of this rule, if consid-  
at conference and agreed upon, need not be filed with  
court, since the parties are permitted to depose witnesses  
pursuant to Mass.R.Crim.P. 35(i).

The parties may also wish to stipulate as to the application  
effect of the excludable time provisions of Mass.  
P. 36(b), e.g., whether time should be excluded from  
trial limits due to the absence of an essential  
and, if so, how much. Mass.R.Crim.P. 36(b)(2)(B).

Rule 12(a)(2)(A) outlines the contents of the pretrial  
report and establishes the requirement that it be  
the defendant when it contains agreements which  
guaranties of constitutional right or stipulations to  
facts. The defendant's signature should not be pro-  
should be subscribed only after his counsel has  
the consequences of this act to him. To expedite  
conference, subdivisions (a)(1) and (b)(1) mandate that  
ant "shall be available for attendance at the pre-  
conference." This requirement assures also that the  
consent to other agreements may readily be ob-

conference report is filed with the clerk, whose re-  
sponsibility it is to monitor filing and advancement of cases

subdivisions (a)(2)(B) and (b)(2)(B) set out the sanctions to  
be imposed upon a failure to file a report and to appear to  
that failure. If counsel refuse to cooperate in the

conference procedure, "extraordinary circumstances" are es-  
tablished which may call for an order to conference the case  
with a judge or special magistrate presiding (a)(1), (b)(1)).

Subdivision (b). This subdivision, which parallels subdivi-  
sion (a), is applicable to those situations in District Court  
jury-waived sessions in which a pretrial conference may be  
ordered within the discretion of the court. Subdivision  
(b)(2)(C) permits the parties to file a conference report if  
they believe that this will be of assistance to themselves or  
the court.

## RULE 12. PLEAS AND WITHDRAWALS OF PLEAS

(Applicable to District Court and Superior Court)

### (a) Entry of Pleas.

(1) *Pleas Which May Be Entered and by Whom.* A defendant may plead not guilty, or guilty, or with  
the consent of the judge, *nolo contendere*, to any  
crime with which he has been charged and over which  
the court has jurisdiction. A plea of guilty or *nolo*  
*contendere* shall be received only from the defendant  
himself except pursuant to the provisions of Rule 18.  
Pleas shall be received in open court and the proceed-  
ings shall be recorded where facilities for recording  
are available. If a defendant refuses to plead or if the  
judge refuses to accept a plea of guilty or *nolo contende-*  
*re*, a plea of not guilty shall be entered.

(2) *Acceptance of Plea of Guilty or Nolo Contende-*  
*re.* A judge may refuse to accept a plea of guilty or  
*nolo contendere*. He shall not accept such a plea  
without first determining that the plea is made volun-  
tarily with an understanding of the nature of the  
charge and the consequences of the plea.

(3) *Admission to Sufficient Facts.* In a District  
Court jury-waived session a defendant may, after a  
plea of not guilty, admit to sufficient facts to warrant  
a finding of guilty.

### (b) Plea Conditioned Upon an Agreement.

(1) *Formation of Agreement; Substance.* The de-  
fendant and his counsel or the defendant when acting  
*pro se* may engage in discussions with the prosecutor  
as to any recommendation to be made to a judge or  
any other action to be taken by the prosecutor upon  
the tender of a plea of guilty or *nolo contendere* to a  
charged offense or to a lesser included offense. The  
agreement of the prosecutor may include:

(A) Charge concessions.

(B) Recommendation of a particular sentence or  
type of punishment with the specific understanding  
that the recommendation shall not be binding upon  
the court.

(C) Recommendation of a particular sentence or  
type of punishment with the specific understanding  
that the defendant shall reserve the right to request  
a lesser sentence or different type of punishment.

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In this subdivision, evidence of a plea of guilty, later withdrawn, or a plea of nolo contendere, or of an offer to plead guilty or nolo contendere to the crime charged or any other crime, or statements made in connection with, and relevant to, any of the foregoing pleas or offers, is not admissible in any civil or criminal proceedings against the person who made the plea or offer. However, evidence of a statement made in connection with, and relevant to, a plea of guilty, later withdrawn, or a plea of nolo contendere, or an offer to plead guilty or nolo contendere to the crime charged or any other crime, is admissible in a criminal proceeding for perjury if the statement was made by the defendant under oath, on the record, and in the presence of counsel.

Adopted June 12, 1986, effective Jan. 1, 1987.

## Reporter's Notes

Although analogous to Fed.R.Crim.P. 11, this rule is drawn from a number of sources. See, e.g., *ABA Standards Relating to Pleas of Guilty* (Approved Draft, 1968); *ALI Model Code of Pre-Arraignment Procedure* §§ 350.1-9 (P.O.D. 1975); National Advisory Commission on Criminal Justice Standards & Goals, *Courts*, Standards 3.1 et seq. (1973); President's Commission on Law Enforcement & Administration of Justice, Task Force Report: *The Courts* 4-13 (1967).

As the United States Supreme Court has observed:

Whatever may be the situation in an ideal world, the fact is that the guilty plea and the often concomitant plea bargain are important components of this country's criminal justice system. Properly administered, they can benefit all concerned.

*Beckwith v. Allison*, 97 S.Ct. 1621, 431 U.S. 63, 71, 52 L.Ed.2d 736 (1977). *Accord* *Bordenkircher v. Hayes*, 98 S.Ct. 63, 431 U.S. 357, 361-62, 54 L.Ed.2d 604 (1978). Rule 12 is intended to guarantee the proper administration of the plea-bargain procedure.

The proffer by a defendant of a guilty plea is a significant part of the criminal process. It represents a decision by the defendant not to put the Commonwealth to the test of proving his guilt beyond a reasonable doubt. Plea bargaining, of course, flows from the "mutuality or advantage" to the defendant and the prosecutors, each with his own reasons for wanting to avoid trial, *Bordenkircher v. Hayes*, 98 S.Ct. 63, 431 U.S. 357, 363, 54 L.Ed.2d 604 (1978), but the Commonwealth and the public have an interest in promoting plea bargaining, ensuring that each such plea be an accurate statement of guilt and a fair termination of criminal proceedings against a defendant. Rule 12 is intended to promote the achievement of those goals.

See also, e.g.,

This subdivision is adopted from *ABA Standards Relating to Pleas of Guilty* § 1.1 (Approved Draft, 1968), which substantially accords with Fed.R.Crim.P. 11(a)-(b).

*Commonwealth v. Foster*, 368 Mass. 100, 330 N.E.2d 155 (1975).

*Commonwealth v. Foster*, 368 Mass. 100, 330 N.E.2d 155 (1975). *Commonwealth v. Foster*, 368 Mass. 100, 330 N.E.2d 155 (1975).

*Commonwealth v. Foster*, 368 Mass. 100, 330 N.E.2d 155 (1975). *Commonwealth v. Foster*, 368 Mass. 100, 330 N.E.2d 155 (1975).

*City of Boston Sitting for Criminal Business* 4 (1971). E.g., *Commonwealth v. McGuirk*, Mass.App.Sh. (1978) 2496, 380 N.E.2d 662; *Commonwealth v. Boddie*, Mass.App.Sh. (1978) 1727, 378 N.E.2d 661; *Commonwealth v. Curry*, Mass.App. Adv.Sh. (1978) 977 (Rescript), 330 N.E.2d 1325.

The requirements of this subdivision are to insure that the fact that the plea was the informed and voluntary act of the defendant appears upon a contemporaneous record of the proceeding, thus reducing the likelihood of a post conviction attack on the validity of a plea of guilty or nolo contendere. See e.g., *Commonwealth v. Foster*, 368 Mass. 100, 330 N.E.2d 155 (1975).

Therefore, except where a corporation is the defendant, or where the defendant is permitted by the General Laws to pay a fine by mail or by appearing before a clerk personally or by authorized agent, the defendant personally must plead if the plea is to be guilty or nolo contendere. The defendant must also personally plead not guilty except where his appearance is excused pursuant to Mass.R.Crim.P. 7(a)(2) and the court enters the plea on his behalf. Mass.R.Crim.P. 7(d)(2).

A plea of guilty is invalid unless the defendant has received the assistance of counsel or has waived counsel. *White v. Maryland*, 33 S.Ct. 1050, 373 U.S. 59, 10 L.Ed.2d 191 (1963); *Moore v. Michigan*, 78 S.Ct. 191, 355 U.S. 155, 2 L.Ed.2d 167 (1957). See District Court Initial R.Crim.P. 2, which in part states:

On any complaint setting forth a charge for which a sentence of imprisonment may be imposed, unless the defendant has waived his right to counsel pursuant to Rule 3:10 of the General Rules of the Supreme Judicial Court, no plea other than 'not guilty' shall be taken or entered and recorded unless his counsel is present.

The plea of nolo contendere may only be entered with the approval of the court. See District Court Initial R.Crim.P., supra, Rule 4; *Commonwealth v. Horton*, 26 Mass. (9 Pick.) 206 (1829). A nolo plea has the same effect as a guilty plea in the case then before the court, e.g., *United States v. American Bakeries*, 284 F.Supp. 864 (W.D.Mich.1968), although it cannot be used against the defendant as an admission in any subsequent civil proceeding. See subdivision (f), infra; *ABA Standards*, supra, § 1.1(a), comment at 15-16.

The requirement that the plea be accepted in open court is to assure that a plea is free from the suspicion of coercion, that it is entered under the scrutiny of the judge in formal proceedings, and that it is on the record to the extent that the court's proceedings are normally recorded, whether by stenographic or electronic means.

The last sentence of this subdivision substantially restates District Court Initial Rule of Criminal Procedure 5 (1971).

(a)(2). A defendant does not have a constitutional right to have his guilty plea accepted by the Court. See *North Carolina v. Alford*, 91 S.Ct. 160, 400 U.S. 25, 38 n. 11, 27 L.Ed.2d 162 (1970), and a plea is to be refused for a variety of reasons, among which are that: 1) the plea is involuntary; 2) the defendant does not understand the nature of the charge ([c]5[A], infra), or the consequences of the plea ([c]5[B], infra); 3) there is no factual basis for the plea ([c]5[A], infra); or 4) there is a factual dispute that should be litigated at trial. If the court is willing to accept the plea, defense counsel, under the direction of the court, is to be responsible for the required interrogation of the defendant as to voluntariness. This accords with existing practice in the Superior

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Court. See *Commonwealth v. Hubbard*, 371 Mass. 160, 355 N.E.2d 469 (1976).

(a)(3). If a defendant desires to admit to sufficient facts in order to expedite his claim of a trial de novo after having waived a jury trial in the first instance, the judge should interrogate the defendant personally to insure that the defendant understands the nature and consequences of such an admission. It has been suggested that because a defendant who admits to sufficient facts is waiving significant rights, he should not be permitted to do so unless his choice is intelligent and voluntary. Compare *Brookhart v. Janis*, 86 S.Ct. 1245, 381 U.S. 1, 16 L.Ed.2d 314 (1966); *People v. Wheeler*, 260 Cal.App.2d 522, 67 Cal.Rptr. 246 (1968). In the majority of cases, however, the defendant will be fully aware of the consequences of an admission to sufficient facts and will make that admission to curtail District Court jury-waived proceedings and obtain a jury trial. Therefore, the formalized procedure for determining the voluntariness of guilty pleas, subdivision (c), infra, is not applicable to the admission to sufficient facts. See generally Rules of Criminal Procedure (U.L.A.) rule 44(a) (1971).

When a defendant admits to sufficient facts, it is contemplated that at least one prosecution witness will be sworn who will testify to the factual basis for the finding of guilt, even though the testimony may include hearsay. District Court Initial R.Crim.P. 5, comment (1971).

Subdivision (b). Section (e)(1)-(5) of Federal Rule of Criminal Procedure 11 is the prototype for this subdivision.

(b)(1). This subdivision outlines the scope of agreements as to concessions or other actions which the defendant and the prosecution may arrive at prior to plea proceedings before a judge. It must be emphasized that these negotiations are to be between the defendant, with or without counsel, and the prosecution, and are not to involve the court.

The words of the Supreme Court as to the binding character of defense-prosecution agreements deserve repetition:

[When a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be a part of the inducement or consideration, such promise must be fulfilled.

*Santobello v. New York*, 92 S.Ct. 495, 404 U.S. 257, 262, 30 L.Ed.2d 427 (1971). Similarly, the Supreme Judicial Court has held that a promise made by a prosecutor is a pledge of public faith and must be enforced. *Commonwealth v. St. John*, 175 Mass. 566, 159 N.E. 599 (1899); accord *Commonwealth v. Harris*, 364 Mass. 236, 303 N.E.2d 115 (1973); *Commonwealth v. Benton*, 356 Mass. 477, 252 N.E.2d 891 (1969). Compare *Blakie v. District Attorney for Suffolk County*, Mass.Adv.Sh. (1978) 1818, 1851, 378 N.E.2d 1368 (Specific performance is in no sense mandated where no guilty plea has been entered, and the defendant's position has not been adversely affected). See subdivision (d), infra.

(b)(2). Early and full disclosure of a plea arrangement reduces the risk of an unfair agreement--unfair to the public because of an unwarranted concession by an overburdened prosecutor anxious to avoid trial, or unfair to the defendant because the concession is either illusory, or so irresistible in light of the inevitable risks of trial as to induce an innocent defendant to plead guilty. E.g., *Jones v. United States*, 423 F.2d 252, 255 (9th Cir.1970). For that reason and to expedite the proceedings, this subdivision requires that the court be informed at the outset of the existence of any agreement. If upon inquiry under subdivision (c)(1), infra, the defendant denies any such agreement, it is incumbent upon the prose-

cutor to notify the court if an agreement in fact has been made.

While a judge may properly have the substance of a plea arrangement revealed to him pursuant to subdivision (c)(1), he may not participate in the negotiations.

The judge is a symbol of impartial justice; the prosecutor is an advocate. The prosecutor can more appropriately assume the role of bargaining agent whereas, to maintain the dignity of the judicial office and respect for the legal process, the judge cannot.

Challer, *Judicial Mapoos: Differential Sentencing and Guilty Pleas--A Constitutional Examination*, 6 Am. Crim. L.Q. 187, 192 (1968).

Although judicial participation in plea bargaining is improper, the provision for disclosure of the agreement is distinguishable from authorization for judicial participation in the bargaining process. The disclosure permitted by subdivision (b)(2) is of an agreement that has previously been concluded and is required to be revealed pursuant to the inquiry under subdivision (c)(1), infra. The proffer of a guilty plea is not motivated by any judicial action.

Subdivision (c).

Subdivision (c)(1) is a product of *Santobello v. New York*, 92 S.Ct. 495, 404 U.S. 257, 30 L.Ed.2d 427 (1971), where it was held that when a plea rests on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, that promise must be fulfilled. Id. at 262. The Court stated further that the adjudicatory element inherent in accepting a plea of guilty must be attended by safeguards to insure the defendant what is reasonably due in the circumstances and if a plea is induced by promises, their essence must in some way be known. 404 U.S. at 261-62.

If upon inquiry the defendant replies that no promises have been made, the judge should instruct the defendant that any promises relating to the imposition of sentence are in no way binding on the court. See Subdivisions (b)(1)-(2), supra. This is because defendants are often loathe to disclose such promises, although it is believed that the increased acceptability of the plea arrangement procedure of this rule will obviate such difficulties.

The effect of such an instruction will depend on the facts of each case, but in no case can it cure the prejudice resulting from a broken promise.

The purposes of subdivision (c)(1) are fourfold. First, airing plea agreements in open court enhances public confidence in the administration of justice. E.g., *Jones v. United States*, 423 F.2d 252, 255 (9th Cir.1970). Secondly, disclosure of prosecutorial promises is the best way to test the voluntariness of the plea. By testing the strength of the inducement, the court obtains the best available evidence of its effect upon the defendant. In this determination, it should be noted that the prosecutor's subjective understanding of the bargain is irrelevant; considerations of fairness require attention to whether the defendant has reasonable grounds for his interpretation thereof. *Blakie v. District Attorney for Suffolk County*, Mass.Adv.Sh. (1978) 1818, 1851 n. 2, 378 N.E.2d 1368. Thirdly, this helps to implement the "factual basis" requirement of subdivision (c)(5)(A), for promises that offer unusual leniency to a defendant are suspect. Finally, this requirement will help to uncover promises which are by their nature improper and thus help to eliminate whatever incentive the prosecution might have to offer improper inducements.

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Pursuant to this subdivision and subdivision (b)(2), supra, the prosecutor and defense counsel have the duty to come forward and disclose the existence and terms of a plea arrangement if the defendant balks at his opportunity to do so, even if the court does not specifically question the prosecutor or defense counsel on this issue. See *Commonwealth v. Stanton*, 2 Mass.App. 614, 317 N.E.2d 487 (1974). This is important practically because often the defendant will not fully disclose the terms of the arrangement. It is important legally because the prosecutor and defense counsel should inform the court whenever they are aware that testimony offered in court is not in full accord with the truth as they know it. See Supreme Judicial Court Rule 3:22 (1971); 27 Mass. 787; Canon 7; EC 7-26.

(c)(2). Under subdivision (c)(2)(A) the judge may inform the defendant that he is disposed to accept the prosecutor's sentence recommendation, pending the outcome of the hearing required by subdivision (c)(5), and that he will not exceed that recommendation without giving the defendant an opportunity to withdraw his plea. On the other hand, the judge may indicate that he does not intend to entertain or consider any recommendation, subdivision (c)(2)(b), in which event the judge's sentencing discretion is unrestricted.

(c)(3). This subdivision is patterned after Fed.R.Crim.P. 11(c)(d) but differs therefrom in that it sets forth with greater specificity the nature of the information that the court must make available to a defendant who wishes to plead guilty. District Court Initial R.Crim.P. 4 required the trial judge, before accepting a guilty plea, to question the defendant in order to insure that the defendant understood essentially what is required by subdivision (c)(3). Sections 14 and 15 of the *ABA Standards Relating to Pleas of Guilty* (Approved Draft, 1968) contain similar provisions, which have, however, been superseded by *ABA Standards Relating to the Function of the Trial Judge* § 1.2 (Approved Draft, 1972). See Rules of Criminal Procedure (U.L.A.) rule 41(b)(6) (1971); *ALI Model Code of Pre-Arraignment Procedure* § 24-4 (P.O.D.1975); National Advisory Commission on Criminal Justice Standards & Goals, *Courts*, standard 3.7 (1973). Neither this subdivision nor District Court Initial R.Crim.P. 4 apply to admissions to sufficient facts.

Subdivision (c)(3)(A) enumerates those immediate consequences of a plea of which a defendant must be specifically informed.

District Court Initial R.Crim.P. 4(b)-(e) (1971, as amended), provided that a defendant charged with a crime for which a sentence of imprisonment could be imposed was to be informed that a guilty plea would preclude his right to a jury trial and would operate as a waiver of his privilege against self-incrimination and of his right to confront witnesses. While the Supreme Judicial Court held in *Commonwealth v. Morrow*, 363 Mass. 601, 604-05, 296 N.E.2d 468 (1973), that *Boykin v. Alabama*, 395 U.S. 238, 241-42, 1969, did not require the judge to expressly state in detail the three rights waived, the court did

recommend the better practice to include specific inquiry as to the defendant's understanding waiver of the three constitutional rights.

*Commonwealth v. Morrow*, supra, at 605. Accord *Huot v. Commonwealth*, 368 Mass. 91, 101, 292 N.E.2d 700 (1973). *Commonwealth v. Jefferson*, 4 Mass.App. 352, 348 N.E.2d 453 (1976).

The court recommended that the proper formulation for advising a defendant as to his waiver of a jury trial is that

"by pleading guilty he [gives] up his right to a trial with or without a jury." *Commonwealth v. Hamilton*, 3 Mass.App. 554, 557 n. 4, 336 N.E.2d 872 (1975). This instruction will serve to emphasize that, upon acceptance of a guilty plea, no trial will be held and all that remains is the imposition of sentence.

Pursuant to subdivision (c)(3)(B), the defendant is to be informed of the maximum possible sentence and the mandatory minimum, if any. This substantially restates District Court Initial R.Crim.P. 4(e) (1971, as amended, 1973).

General Laws c. 233, § 23, which mandates the maximum sentence for a felony defendant who has been previously convicted of two felonies and sentenced to more than three years on each, is an example of that type of provision contemplated by the "second offense" language of (c)(3)(B).

It has been stated that being subject to the "sexually dangerous person" provisions of G.L. c. 123A "is but one of many contingent consequences of being confined" after conviction. *Commonwealth v. Morrow*, 363 Mass. 601, 606, 296 N.E.2d 468 (1973), and therefore need not be explained to a defendant prior to acceptance of his plea. See *Andrews v. Commonwealth*, 361 Mass. 722, 282 N.E.2d 376 (1972). This rule changes the law with respect to those crimes for which the defendant may, after conviction, be committed by the court sua sponte or on motion of the district attorney for examination. G.L. c. 123A, § 1.

The failure to inform the defendant of the maximum possible sentence may result in a guilty plea being set aside as involuntary. E.g., *United States ex rel. Larson v. Damon*, 496 F.2d 718 (2d Cir.), cert. denied, 95 S.Ct. 216, 419 U.S. 954, 42 L.Ed.2d 172 (1971); *Wade v. Wainwright*, 429 F.2d 898 (5th Cir.1969), distinguished in *Commonwealth v. Leate*, 367 Mass. 689, 695-696, 327 N.E.2d 866 (1975). Compare *Commonwealth v. Curry*, Mass.App. Adv. Sh. (1979) 977, 380 N.E.2d 1325 (Rescript) (Failure to advise of maximum possible sentence harmless error, if error at all).

While *Boykin v. Alabama*, 395 U.S. 238, 23 L.Ed.2d 274 (1969) requires that the record show the conclusivity of the plea on further litigation, it does not require that a defendant be informed "in so many words" that by his plea of guilty he waives his right of appeal. *Commonwealth v. Hamilton*, 3 Mass.App. 554, 558, 336 N.E.2d 872 (1975). The Appeals Court has cautioned that if such information is given, it will "require careful formulation to avoid creating confusion as to the right to appeal to the Appellate Division of the Superior Court and the right to post-conviction remedies under special circumstances." *Id.* at 558, n. 6.

In *Durant v. United States*, 410 F.2d 689 (1st Cir.1969) the Court of Appeals held that full inquiry under Fed.R.Crim.P. 11 is particularly important when ineligibility for parole is a consequence of a conviction. The same is true of a mandatory special parole term. *United States v. Yazbeck*, 524 F.2d 641 (1st Cir.1975). The Massachusetts courts are of the view, however, that the limitations on, or requirements for, parole, are but contingent consequences of being confined, and do not require the court to advise the defendant of the legal and practical complexities of the parole law. *Commonwealth v. Stanton*, 2 Mass.App. 614, 622, 317 N.E.2d 487 (1974). Accord *Commonwealth v. Brown*, Mass.App. Adv. Sh. (1978) 92, 372 N.E.2d 530 (Rescript); *Commonwealth v. Jefferson*, 4 Mass.App. 352, 348 N.E.2d 453 (1976). See *Commonwealth v. Morrow*, 363 Mass. 601, 606, 296 N.E.2d 468 (1973).

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Pursuant to G.L. c. 278, § 29D, the defendant must be advised that if he is not a United States citizen, a conviction may have the consequences of deportation, exclusion of admission, or denial of naturalization. This information is expressly required by the statute to be imparted by the judge, rather than by counsel as permitted by this subdivision with respect to other consequences.

More indefinite collateral consequences, such as ineligibility to receive good time deductions from a sentence being served after conviction of certain crimes, are beyond the scope of the information of which the defendant must be made aware under this subdivision. *Commonwealth v. Brown*, Mass.App.Adv.Sh. (1978) 92, 372 N.E.2d 530 (descriptive).

(c)(4). To this point the court has been informed of the existence of and substance of a plea arrangement, has indicated a willingness to entertain that arrangement, and has informed the defendant or caused him to be informed of the consequences of acceptance of the plea. The defendant now formally tenders his plea to the court, which then conducts a hearing to determine the voluntariness thereof.

(c)(5). The Supreme Court, in *Johnson v. Zerbst*, 58 S.Ct. 1019, 304 U.S. 458, 82 L.Ed. 1161 (1938), declared that a waiver is "an intentional relinquishment or abandonment of a known right or privilege." *Id.* at 161 (emphasis supplied). The Court also recognized a presumption against the waiver of constitutional rights, thus increasing the need for the adoption of procedural safeguards to insure that presumption is effectively rebutted. In *Hoot v. Commonwealth*, 363 Mass. 91, 196-101, 292 N.E.2d 700 (1973), the court recognized that *Boykin v. Alabama*, 89 S.Ct. 1709, 357 U.S. 238, 23 L.Ed.2d 274 (1969), placed the burden of establishing on review that a guilty plea is made voluntarily and intelligently on the prosecution, but denied retroactive application. As to post-*Boykin* pleas, the Commonwealth must meet that burden. See *Commonwealth v. McGuirk*, Mass.App.Adv.Sh. (1978) 2196, 2500 n. 4, 380 N.E.2d 662; *Commonwealth v. Morrow*, 363 Mass. 601, 604, 296 N.E.2d 468 (1973). In *Boykin*, supra, the Supreme Court expressly stated that the standards applicable to constitutional waivers apply to pleas of guilty. Such a holding is consistent with existing Massachusetts law. E.g., District Court Initial R.Crim.P. 4 (1971). Therefore, as a matter of constitutional due process, a guilty plea should not be accepted, and if accepted must be later set aside, unless the record shows affirmatively that the defendant entered the plea freely and understandingly. *Commonwealth v. Foster*, 368 Mass. 100, 102, 330 N.E.2d 155 (1975).

In order for the defendant's plea to be accepted as intelligently made, the judge must find that the defendant understands "(1) the meaning of the charge, (2) what acts are necessary to establish guilt, and (3) the consequences of pleading guilty to the charge." *Munich v. United States*, 337 F.2d 356, 359 (9th Cir.1964) (citations omitted), or expressed differently, the defendant must have "a rational as well as factual understanding of the proceedings against him." *Berry v. United States*, 286 F.Supp. 816, 819 (E.D.Pa.1968).

The first distinct requirement is that the defendant understand the nature of the charge. See District Court Initial R.Crim.P. 4(b) (1971). A plea may be involuntary because the defendant has such an incomplete understanding of the charge that his plea is an unintelligent admission of guilt. Without adequate notice of the nature of the charge against him, or an indication that he in fact comprehends the charge, the defendant's plea cannot stand as voluntary. *Smith v. O'Grady*, 61 S.Ct. 572, 312 U.S. 329, 85 L.Ed. 859 (1941). In

*Henderson v. Morgan*, 96 S.Ct. 2253, 426 U.S. 637, 1 L.Ed.2d 108 (1975), the Supreme Court held that a guilty plea to a charge of second-degree murder was involuntary because the defendant was not informed that intent to kill was an element of that crime. The Court assumed, without deciding, that notice of the true nature or substance of a charge does not always require a description of every element of the offense, however. *Id.* at 647 n. 18. The Court agreed with the Government that in the usual case, a reviewing court should examine the totality of the circumstances and determine whether the substance of the charge, as opposed to its technical elements, was conveyed to the defendant, rather than testing the voluntariness of his plea according to whether a ritualistic litany of the formal elements of the offenses was read to him. *Id.* at 647. Accord *Commonwealth v. McGuirk*, Mass.App.Adv.Sh. (1978) 2196, 380 N.E.2d 662; *Commonwealth v. Bolduc*, Mass.App.Sh. (1978) 1727, 1736-37, 378 N.E.2d 601. In *McGuirk*, the court states three ways in which the *Henderson* deficiency can be cured: 1) the judge can explain the essential elements of the crime charged; 2) counsel may represent that he has explained to the defendant the elements he admits by his plea; or 3) the defendant may admit to or stipulate to facts constituting any unexplained elements. Mass.App.Sh. (1978) at 2503-04. See *Commonwealth v. Hubbard*, 371 Mass. 160, 170-171, 355 N.E.2d 469 (1976); *Commonwealth v. Curry*, Mass.App.Adv.Sh. (1978) 977, 380 N.E.2d 1325 (Rescript).

For an example of the scope of the examination conducted to satisfy the *Boykin* requirement of an affirmative showing of understanding and voluntariness, see *Commonwealth v. Taylor*, 370 Mass. 111, 141-45 n. 5, 345 N.E.2d 695 (1976). In conducting that examination, the judge is to rely on his own observations and discernment in concluding that the defendant understands the questions. *Commonwealth v. Leate*, 367 Mass. 689, 696, 327 N.E.2d 866 (1975); *Commonwealth v. Curry*, Mass.App.Adv.Sh. (1978) 977, 380 N.E.2d 1325 (Rescript). The question of whether a defendant is competent to plead is answered by applying the same standard which determines whether a defendant is competent to stand trial. *Commonwealth v. Leate*, supra, at 696. *Commonwealth v. Morrow*, 363 Mass. 601, 607, 296 N.E.2d 468 (1973).

(c)(5)(A). This subdivision is based upon ABA *Standard Relating to Pleas of Guilty* § 1.6 (Approved Draft, 1968) and accords with District Court Initial R.Crim.P. 5 (1971). See Fed.R.Crim.P. 11(f).

The "factual basis" standard is consistent with the requirements of prior procedure established by District Court Initial R.Crim.P. 5 (1971). The comment to that rule states, "It is contemplated . . . that at least one prosecution witness will be sworn and testify to the factual basis of the finding. This should be a minimum standard for this subdivision also. The court should additionally consider the possibility of interrogating further witnesses, the prosecutor concerning the strength of his case, and the defendant." See S. MOORE, FEDERAL PRACTICE para. 11.03[3] at 11-7 (1978); ABA *Standards Relating to Pleas of Guilty* § 1.6 comment at 32 (Approved Draft, 1968).

*North Carolina v. Alford*, 91 S.Ct. 160, 100 U.S. 25, 27 L.Ed.2d 162 (1970), takes the position that a defendant may plead guilty even if he asserts his innocence. Accord *Hoot v. Commonwealth*, 363 Mass. 91, 292 N.E.2d 700 (1973). If a factual basis for such a plea exists, it is only fair to allow a defendant who is aware of the law, the facts, and the consequences of his plea to attempt to reduce the severity of

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## RULES OF CRIMINAL PROCEDURE

## Rule 12

his punishment by pleading guilty. See *Commonwealth v. Hubbard*, 371 Mass. 160, 170-72, 355 N.E.2d 169 (1976). The defendant is free to weigh the evidence against him and on his basis to waive his right to trial. If the waiver is voluntary and intelligent it should be upheld.

Subdivision (c)(5)(A) is not made applicable to nolo pleas. The purpose of permitting a nolo plea is to relieve the defendant of the adverse repercussions that can result from introduction of evidence from the present criminal proceedings. This purpose would be undermined to the extent it discloses led to subsequent civil proceedings or evidence to be used at such proceedings; notwithstanding the fact that the disclosures themselves could not be used in evidence. The Federal Rules Advisory Committee stated in *comment* to Fed.R.Crim.P. 11: "it is desirable in some cases to grant entry of judgment upon a plea of nolo contendere without inquiry into the factual basis for the plea."

Subdivision (c)(5)(B). At the conclusion of the hearing, if the judge finds that the plea "is the defendant's own, guided by reasonable advice of his counsel, his own knowledge of what he has done, and a fair understanding of the alternatives," it will be considered voluntary. *Commonwealth v. Bolduc*, Mass. Adv. Sh. (1978) 1727, 1734, 378 N.E.2d 661; *quoting* *Commonwealth v. Manning*, 367 Mass. 699, 706, 327 N.E.2d 196 (1975). The judge may then accept the plea or, notwithstanding the fact that it is voluntary, reject it. See subdivision (c)(5)(A), *infra*.

Subdivision (c)(5)(C). If the plea is accepted, the judge shall proceed with sentencing as after a verdict or finding of guilty under Mass.R.Crim.P. 28(b).

Subdivision (c)(5)(D). This subdivision is drawn in part from Fed. R.Crim.P. 11(e)(3)-(4) and from ABA *Standards Relating to Pleas of Guilty* § 2.1 (Approved Draft, 1968). See Rules of Criminal Procedure (U.L.A.) Rule 11(e) (1974). Compare Mass.R.Crim.P. 32(d) (plea may be withdrawn after sentence "to correct manifest injustice") with ABA *Model Code of Pre-Arrest Procedure* § 350.6 (P.O.D.1975) (defendant may withdraw plea if sentence to be imposed is more severe than that provided in plea agreement).

Mass.R.Crim.P. existing statutes relative to the withdrawal of a plea after imposition of sentence are intended to be unaffected by this rule. General Laws c. 278 §§ 29A (St.1959, c. 29A) and 29C (St.1962, c. 310, § 2) permitted the retraction of a sentence and the withdrawal of any plea upon which the sentence was imposed within sixty days of sentencing, if sentence has not been done. Now see Mass.R.Crim.P. 32(d). General Laws c. 278, § 29B (as amended) grants the defendant an absolute right to withdraw his plea prior to sentencing. If the plea was offered without the assistance of counsel, this section applies even when counsel has been waived and is therefore an exception to the rule that the defendant must show that justice has not been done.

In such instances, the trial judge is lodged with the duty to determine that the withdrawal unless the withdrawal is in the interest of justice.

Subdivision (c)(5)(E). If the defendant can show that the plea was not voluntary, then a motion for withdrawal of the plea. For these requirements are constitutional and the validity of the plea.

Subdivision (c)(5)(F). Subdivision (c)(5)(F), the phrase "exceed an agreed recommendation for a particular sentence or type of punishment or an agreed recommendation for a particular sentence or type of punishment" means to vary from

the arrangement agreed upon by the parties in a manner which is detrimental or prejudicial to the interests of the defendant. Where the particular sentence or type of punishment or other disposition which would be imposed by the judge pursuant to a plea arrangement is substantially at variance with the recommendation, the defendant is to be allowed to withdraw his plea. See *Commonwealth v. Taylor*, 370 Mass. 141, 145-46, 345 N.E.2d 605 (1976).

It should be noted that this subdivision only contemplates the type of agreement where the prosecutor promises to recommend a sentence or other disposition. In other types of agreements, which require no judicial ratification, disclosure to the court prior to the tender of the plea serves no purpose other than determining whether the plea is knowingly and voluntarily made. For example, the promise by the prosecutor to enter a nolo prosequi to certain charges (b)(1)(A), *infra* may be fulfilled without judicial approval for the "[p]ower to enter a nolo prosequi is absolute in the prosecuting officer . . . except possibly in instances of scandalous abuse of the authority." *Commonwealth v. Dascalakis*, 246 Mass. 12, 18, 149 N.E. 470 (1923). See Mass. R.Crim.P. 16.

Upon disclosure of the plea arrangement pursuant to subdivisions (b)(2) or (c)(1), the judge has many available options. After reviewing the arrangement and, if desired, the probation report, the judge may concur in the recommendation; concur in the recommendation, but condition the concurrence upon facts being found consistent with representations made to him; refuse to accept the recommendation; or propose an alternative disposition, giving the defendant a reasonable opportunity to consider the alternative before deciding whether to persist in his plea or proceed to trial.

Subdivision (d). It is emphasized in subdivision (d) that if the defendant proceeds to trial having had a recommendation refused or having withdrawn his tender of a plea, then any agreements which arose out of prior negotiations, except as to charges which have already been not prosequed, are not binding upon the court or the prosecution.

Subdivision (d) is designed to discourage the practice of "judge-shopping," that is, tendering, withdrawing, and retendering a guilty plea until a judge is found who will agree to the disposition favored by the defendant. A defendant is to have one opportunity to have a plea recommendation reviewed. If it is rejected or if he withdraws his offer to plead, prior concessions or agreements as to recommendations for disposition are no longer viable. See *Blaisie v. District Attorney for Suffolk County, Mass. Adv. Sh. (1978) 1848, 1854 & n. 3, 378 N.E.2d 1368*.

Subdivision (e). The conditions governing the availability to the defendant of the probation report are the same as those which control under Mass.R.Crim.P. 28(d)(3). It is important for the defendant to have access to such information so that he can more effectively bargain with the prosecutor and more accurately predict how the court will react to proposed dispositions. The judge need not always view the probation report to properly decide whether it should be released to the defendant. The judge can rely on representations made by the probation department or by the prosecutor in reaching his decision.

Subdivision (f). Drawn from Fed.R.Crim.P. 11(e)(6), this subdivision changes the rule in Massachusetts that a plea that has been withdrawn may be introduced in subsequent proceedings as an admission by the defendant. *Morrissey v. Pevall*, 204 Mass. 268, 23 N.E.2d 111, 124 A.L.R. 1522 (1939).

## Rule 12

## RULES OF CRIMINAL PROCEDURE

The proposal is consistent with the modern trend and with the rule in federal courts. See *ABA Standards Relating to Pleas of Guilty*, §§ 2.2, 3.4 (Approved Draft, 1968); *Rules of Criminal Procedure* (U.L.A.) rule 44(f) (1974); *ALI Model Code of Pre-Arrest Procedure* § 350.7 (P.O.D.1975).

In *Kercheval v. United States*, 47 S.Ct. 582, 274 U.S. 220, 71 L.Ed. 1009 (1927), the Supreme Court said that permitting a withdrawn plea to be used in subsequent proceedings undermines the rule allowing the plea to be withdrawn. A court adjudication of the impropriety of admitting the plea indicates the improvidence of using the plea for any evidentiary purposes. Subdivision (f) had already been anticipated in part by the decision in *White v. Maryland*, 83 S.Ct. 1050, 373 U.S. 59, 10 L.Ed.2d 193 (1963), in which the Supreme Court said that the Constitution requires the invalidation and subsequent non-use of pleas entered by a defendant without the advice of counsel and where counsel had not been waived. It is merely an expansion of this principle along lines consistent with the underlying logic of that decision to hold that all invalid pleas should not be later admissible in evidence.

Additional justifications are that juries tend to give undue weight to the introduction of prior pleas, and that *Miranda v. Arizona*, 86 S.Ct. 1602, 384 U.S. 436, 16 L.Ed.2d 694, 10 A.L.R.3d 974 (1966), suggests that the fifth amendment requires admissions obtained in a manner inconsistent with the preservation of constitutional rights to be inadmissible in any subsequent criminal proceeding.

## RULE 13. PRETRIAL MOTIONS

(Applicable to District Court and Superior Court)

## (a) In General.

(1) *Requirement of Writing and Signature; Waiver.* A pretrial motion shall be in writing and signed by the party making the motion or the attorney for that party. Pretrial motions shall be filed within the time allowed by subdivision (d) of this rule. Notwithstanding the foregoing, the failure of the defendant to file pretrial motions in a District Court jury-waived session, or if filed, the denial thereof, shall not constitute a waiver of the right to file such motions upon an appeal to a District Court jury session.

(2) *Grounds and Affidavit.* A pretrial motion shall state the grounds on which it is based and shall include in separately numbered paragraphs all reasons, defenses, or objections then available, which shall be set forth with particularity. If there are multiple charges, a motion filed pursuant to this rule shall specify the particular charge to which it applies. Grounds not stated which reasonably could have been known at the time a motion is filed shall be deemed to have been waived, but a judge for cause shown may grant relief from such waiver. In addition, an affidavit detailing all facts relied upon in support of the motion and signed by a person with personal knowledge of the factual basis of the motion shall be attached.

(3) *Service and Notice.* A copy of any pretrial motion and supporting affidavits shall be served on all parties or their attorneys pursuant to Rule 32 at the time the originals are filed. Opposing affidavits shall

be served not later than one day before the hearing. For cause shown the requirements of this subdivision (3) may be waived by the court.

(4) *Memoranda of Law.* The judge or special magistrate may require the filing of a memorandum of law, in such form and within such time as he may direct, as a condition precedent to a hearing on a motion or interlocutory matter. No motion to suppress evidence, other than evidence seized during a warrantless search, and no motion to dismiss may be filed unless accompanied by a memorandum of law, except when otherwise ordered by the judge or special magistrate.

(5) *Renewal.* Upon a showing that substantial justice requires, the judge or special magistrate may permit a pretrial motion which has been heard and denied to be renewed.

## (b) Bill of Particulars.

(1) *Motion.* Within the time provided for the filing of pretrial motions by this rule or within such other time as the judge may allow, a defendant may request or the judge upon his own motion may order that the prosecution file a statement of such particulars as may be necessary to give both the defendant and the court reasonable notice of the crime charged, including time, place, manner, or means.

(2) *Amendment.* If at trial there exists a material variance between the evidence and bill of particulars, the judge may order the bill of particulars amended or may grant such other relief as justice requires.

## (c) Motion to Dismiss or to Grant Appropriate Relief.

(1) All defenses available to a defendant by plea other than not guilty, shall only be raised by a motion to dismiss or by a motion to grant appropriate relief.

(2) A defense or objection which is capable of determination without trial of the general issue shall be raised before trial by motion.

## (d) Filing; Hearing on Motions.

## (1) District Court.

## (A) No Conference Ordered.

(i) *Filing.* A pretrial motion shall be filed and marked up for hearing not less than five days prior to trial or within such other time as the court may order. The judge for cause shown may entertain a pretrial motion at any time before trial.

(ii) *Scheduling Hearings on Motions.* If the parties have agreed to a mutually convenient time for the hearing of a pretrial motion, the moving party may request that the clerk mark up the motion for hearing at that time. If so requested, the clerk shall mark up the motion for hearing at that time unless the judge otherwise orders.

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**COMMONWEALTH OF MASSACHUSETTS**

APPEALS COURT  
CLERK'S OFFICE  
1500 NEW COURT HOUSE  
BOSTON, MASSACHUSETTS 02108  
(617) 725-8106

May 1, 2002

Joshua R. Weinberger, Esquire  
136 Warren Ave  
P.O. Box 4128  
Brockton, MA 02303

RE: No. 2001-P-0795

**COMMONWEALTH**  
**vs.**  
**CHARLES WILKERSON**

**NOTICE OF DOCKET ENTRY**

Please take note that on May 1, 2002, the following entry was made on the docket of the above-referenced case:

Decision: Rule 1:28 (L-S-MI). Order denying motion for new trial affirmed. \*Notice. (See image on file.)

Very truly yours,

The Clerk's Office

Dated: May 1, 2002

To: Rosemary Daly, A.D.A.  
Joshua R. Weinberger, Esquire

Commonwealth of Massachusetts

Appeals Court for the Commonwealth

At Boston,

In the case no. 01-P-795

COMMONWEALTH

vs.

CHARLES WILKERSON.

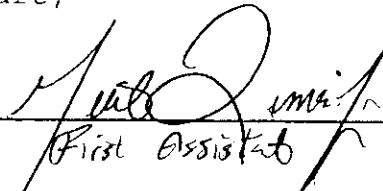
Pending in the District (Dorchester)

Court for the County of Suffolk

Ordered, that the following entry be made in the docket:

Order denying motion for  
new trial affirmed.

By the Court,

  
\_\_\_\_\_, Clerk  
Date May 1, 2002  
First Assistant

NOTE:

The original of the within rescript  
will issue in due course, pursuant  
to M.R.A.P23

APPEALS COURT

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

01-P-795

COMMONWEALTH

vs.

CHARLES WILKERSON.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The defendant appeals the denial of his motion for new trial because, he argues, there is no evidence that his guilty plea was entered voluntarily and intelligently.

The defendant refers to Boykin v. Alabama, 395 U.S. 238, 242-243 (1969), and the constitutional requirement that a guilty plea must be vacated or nullified unless the record of the plea proceedings demonstrates that it was knowing and voluntary. He asserts that the Commonwealth cannot establish these requirements because the Commonwealth cannot show compliance with procedures and explanations called for in connection with admission to sufficient facts. See Commonwealth v. Duquette, 386 Mass. 834, 841-842 (1982); Commonwealth v. Mele, 20 Mass. App. Ct. 958, 958 (1985). As a consequence, the defendant asserts that his conviction must necessarily be set aside.

The defendant's contention is governed by the principles expressed in Commonwealth v. Lopez, 426 Mass. 657, 661-665 (1998), and Commonwealth v. Grant, 426 Mass. 667, 671 (1998).

Here, as in Lopez and Grant, the record of the defendant's admissions and sentencing cannot be obtained, through no fault of the Commonwealth, because the tape recording of the proceeding apparently has been destroyed pursuant to court rule. See Special Rules of the District Courts 211(A)(4). While acknowledging that the Commonwealth has the obligation to prove that a contemporaneous record of a defendant's plea hearing satisfies certain standards of voluntariness and understanding, we have held that if that record "is unavailable, it may be reconstructed through testimony or other suitable proof of what happened in court when the guilty plea was taken." Commonwealth v. Quinones, 414 Mass. 423, 432 (1993) (citations omitted). See Commonwealth v. Rzepphiewski, 431 Mass. 48, 53-54 (2000).

Further, the presumption of regularity and the policy of finality come into play, as has been explained in Commonwealth v. Lopez, supra at 664-665, to place on the defendant the requirement of showing some basis that adequately supports a negation of his conviction or which, at the very least, warrants further inquiry in the district court. Commonwealth v. Grant, supra at 671. We agree with the Commonwealth that the defendant's presentation does not justify relief.

The defendant claims that his trial counsel failed to inform him that by admitting to sufficient facts, he was waiving his

right to a jury trial. Nevertheless, the record, as reconstructed, shows that the defendant signed a waiver of the right to an initial jury trial in this case. Further, the docket sheet indicates that the defendant was advised of his right to a jury trial and that the defendant waived that right. "These facts bespeak the defendant's intention to consummate the plea bargain." Commonwealth v. Grant, supra at 672.

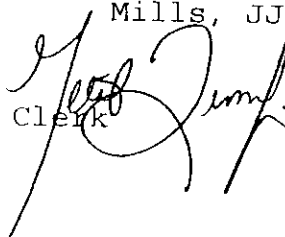
In addition, the judge who denied the defendant's motion to withdraw his plea was the same judge who took the plea and implemented the plea bargain. We grant substantial deference to a decision denying a rule 30(b) motion of this type when the judge passing on the motion is the same judge who heard the plea. Commonwealth v. Amirault, 424 Mass. 618, 646 (1997). The judge had the defendant's memorandum of law and heard argument on the defendant's motion to withdraw his admissions before denying the motion. The judge appeared to have relied on the fact that the defendant was not inexperienced when it came to district court practice in 1993. See Commonwealth v. Russell, 37 Mass. App. Ct. 152, 157 (1994), cert. denied, 513 U.S. 1094 (1995). The judge noted that on the same date as the plea in question, the defendant pleaded to another charge in a district court jury session. He also had appealed a prior case to the jury session, and defaulted there. As such, the judge noted, the defendant had

exercised his jury trial right in the past and disposed of a case in the jury session. This suggests that the defendant had an awareness of the mechanics of a trial, his right to confront witnesses and the like, and his right to have his guilt or innocence ultimately determined by a jury. See ibid. This circumstance supports the conclusion that the defendant understood the consequences of his admissions on May 10, 1993. Commonwealth v. Grant, 426 Mass. at 673.

The defendant's motion for a new trial properly was denied. ✓

So ordered.

By the Court (Laurence, Smith, &  
Mills, JJ.)

Asst. Clerk 

Entered: May 1, 2002.

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✓ The defendant's reliance on G. L. c. 263, § 6 is inapposite. "In G. L. c. 263, § 6, the Legislature has expressed a definite policy as to the required procedure for conducting a criminal trial without a jury, a policy which requires a written waiver by the defendant filed with the clerk." Commonwealth v. Wheeler, 42 Mass. App. Ct. 933, 935 (1997). See Ciummei v. Commonwealth, 378 Mass. 504, 509-511 (1979). That provision, however, does not speak to a defendant's decision to plead guilty; it applies to a defendant's decision to forego a jury trial in favor of a bench trial. See Commonwealth v. Hernandez, 42 Mass. App. Ct. 780, 784 (1997).

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**STATEMENT OF THE ISSUES**

1. Whether the trial court erred in denying Defendant's Motion for a New Trial when there was no evidence that the Defendant's guilty plea was entered understandingly and voluntarily.

**STATEMENT OF THE CASE**

On or about August 18, 1992, a complaint issued against Mr. Charles Wilkerson ("Mr. Wilkerson") for one count of possession of a Class B substance with intent to distribute in violation of Massachusetts General Laws chapter 94C section 32A, and for one count of conspiracy to violate the controlled substance laws in violation of Massachusetts General Laws chapter 94C section 40. (Record Appendix, pages 1-4, hereinafter "R. 1-4"). On or about May 10, 1993, Mr. Wilkerson admitted to sufficient facts on both counts. (R. 2). As a result of this admission, the Honorable Judge Dolan found Mr. Wilkerson guilty of Count I, and sentenced Mr. Wilkerson to two years in the house of corrections, but suspended the sentence for two years. (R. 2). He also found Mr. Wilkerson guilty of Count II, but filed the sentence. (R. 2). On or about February 15, 2000, Defense Counsel filed a Motion for New Trial. (R. 3, R. 4, R. 5.). The Honorable Judge Dolan denied the Motion for New Trial on or about August 3, 2000. (R. 3-4, R. 12). On or about August

7, 2000, the Defendant filed a timely notice of appeal.  
(R. 3, R. 4, R. 13).

#### **STATEMENT OF FACTS**

On February 15, 2000, Defendant filed a Motion for a New Trial pursuant to Rule 30(b) of the Massachusetts Rules of Criminal Procedure. (R. 4, 6). Defense Counsel included a Memorandum of Law and supporting affidavits with the Motion. (R. 7-12). In particular, the accompanying affidavit of Charles Wilkerson stated, in part, as follows:

"4. On May 10, 1993, I was brought before the Court on the default warrant. Attorney Tomasetti was appointed to represent me.

5. I had a brief conversation with Mr. Tomasetti in the lockup in which he told me that he could not try the case, but that he could get me a suspended sentence. He did not discuss the facts of the case, review any defenses to the case, or discuss the search warrant that had resulted in the seizure of evidence.

6. I was subsequently brought into the courtroom where the prosecutor told the judge that there was an agreement.

7. I was asked if I understood the charges to which I was pleading guilty. I was not asked or told about the right to jury that I was waiving, i.e., that the jury is made up of members of the community, that I could participate in their selection, that their verdict must be unanimous, that the jury decides the facts, and the judge rules on the law and imposes sentence if found guilty.

8. My admission to sufficient facts was not voluntary or intelligent because I was not

fully advised of my constitutional right to a jury trial.

9. My admission to sufficient facts was not voluntary because I thought that if I did not plead guilty and claimed my right to a jury trial, I would have to remain in jail."

(R. 7-8). Defense Counsel also attached his own affidavit to the Motion for a New Trial. (R. 6). Defense Counsel's affidavit established that the tape recording of the plea colloquy was no longer available. (R. 6). It further established that Attorney Tomasetti had no recollection of the proceedings in which Mr. Wilkerson admitted to sufficient facts. (R. 6).

The Trial Court sent copies of the Motion for a New Trial to the Honorable Judge Dolan in the New Bedford District Court. (R. 3). Judge Dolan subsequently scheduled a hearing on the matter in the Quincy District Court on August 1, 2000. (R. 3). After hearing, Judge Dolan denied the Motion for a New Trial. (R. 3, R. 4, R. 12). In his decision, Judge Dolan stated, in part, "While the defendant probably did not get a full colloquy on the case, he was advised of his right to appeal to a jury trial. He has exercised that right in the past and disposed of a case in the jury session." (R. 12).

### ARGUMENT

- I. THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION FOR A NEW TRIAL BECAUSE THERE WAS NO EVIDENCE THAT THE DEFENDANT'S GUILTY PLEA WAS ENTERED UNDERSTANDINGLY AND VOLUNTARILY.

The Trial Court committed reversible error when it denied Mr. Wilkerson's Motion for a New Trial because there was no affirmative showing that Mr. Wilkerson's plea was made intelligently and voluntarily.

A defendant in a criminal case may waive his right to a jury trial, and may enter a plea of guilty, if he so chooses. M.G.L. c. 263 sec. 6; Mass.R.Crim.P. 12. "It is well established, however, that a guilty plea may not be accepted without an affirmative showing that the defendant acts voluntarily and understands the consequences of his plea." Commonwealth v. Duquette, 386 Mass. 834, 841 (1982), citing to Boykin v. Alabama, 395 U.S. 238, 242 (1969); Commonwealth v. Morrow, 363 Mass. 601, 604 (1973). Rule 12(c)(3) of the Massachusetts Rules of Criminal Procedure "specifically requires that the judge to ensure that the defendant is informed, on the record and in open court, of the three constitutional rights which are waived by a plea of guilty: the right to trial, the right to confront one's accusers, and the privilege against self-incrimination." See Id. citing to Boykin at 243.

In this regard, the "judge must engage in a colloquy with the defendant in which, during the exchange, 'the judge will advise the defendant of his constitutional right to a jury trial, and will satisfy himself that any waiver by the defendant is made voluntarily and intelligently.'" Commonwealth v. Hernandez, 42 Mass.App.Ct. 780, 784 (1997) quoting Ciummei v. Commonwealth, 378 Mass. 504, 509 (1979). "Moreover, in order to ensure a record demonstrating that the defendant clearly understood 'this precious constitutional right,' . . . the trial judge 'should make sure that the defendant has conferred with his counsel about his waiver, and that he has not been pressured or cajoled and is not intoxicated or otherwise rendered incapable of rational judgment.'" See Id. quoting Commonwealth v. Dietrich, 381 Mass. 458, 460 (1980); Commonwealth v. Abreau, 391 Mass. 777, 780 (1980); Ciummei at 510.

The purpose of the colloquy is to ensure that Defense Counsel has adequately advised the Defendant of the significant nature of the rights he forsakes. See Id. quoting Commonwealth v. Pavao, 423 Mass. 708, 803 (1996); Commowealth v. Abreau, at 778. This colloquy is constitutionally mandated. Commonwealth v. Pavao at 800 citing Boykin v. Alabama; Commonwealth v. Foster,

368 Mass. 100 (1975). As a result, the Trial Court must administer a colloquy in conjunction with each and every plea. See Id. Because of the constitutional nature of this mandate, harmless error analysis is inappropriate. See Id. "[A]s a matter of constitutional due process, a guilty plea should not be accepted, and if accepted must be later set aside unless the record shows affirmatively that the defendant entered the plea freely and understandingly." Commonwealth v. Foster, at 102.

A defendant who wishes to challenge a guilty plea must do so by bringing a Motion for New Trial. Commonwealth v. De La Zerda, 416 Mass. 247, 250 (1993) citing to Commonwealth v. Fernandes, 380 Mass. 714, 715 (1984); Commonwealth v. Huot, 380 Mass. 403, 405 (1980) citing Commonwealth v. Penrose, 363 Mass. 677 (1973). While the Trial Court normally has discretion in such matters, it has no discretion to deny a Motion for New Trial if the plea was entered in violation of the Defendant's constitutional rights. See Id. At the hearing on the Motion for New Trial, "[t]he burden is on the Commonwealth to show that a challenged guilty plea was understandingly and voluntarily made." Duquette at 841 citing to Commonwealth v. Morrow, 363 Mass 601, 604 (1973); Huot at 99-100.

In the present case, the Trial Court failed to protect Mr. Wilkerson's constitutional rights. Trial Counsel failed to discuss the facts of the case with Mr. Wilkerson. He further failed to review the defenses or to discuss possible issues of suppression. The Trial Court compounded Trial Counsel's errors by failing to conduct a colloquy. The Trial Court failed to advise Mr. Wilkerson that, by admitting to sufficient facts, he was waiving his right to a jury trial. It failed to advise him that the jury would consist of members of the community, that Mr. Wilkerson could participate in their selection, that their verdict must be unanimous, and that the jury decides the facts.

Successor Defense Counsel appropriately attacked Mr. Wilkerson's plea by filing a Motion for New Trial. The Trial Court erroneously applied a "harmless error" standard in reviewing this motion. The Trial Court admitted that it had failed to provide Mr. Wilkerson with a plea colloquy. Nonetheless, it concluded that its deficiencies did not cause Mr. Wilkerson any prejudice because Mr. Wilkerson had disposed of other criminal matters in the past.

The Trial Court erred in its analysis. If it failed to conduct the colloquy, it must order a new

trial; there is no discretion. Its failure to conduct a constitutionally mandated colloquy must result in a new trial upon motion.

Because the Trial Court deprived Mr. Wilkerson of his "precious constitutional right" the Motion for New Trial should have been granted. As a result, Mr. Wilkerson's convictions should be reversed, and his matter remanded for a new trial.

#### **CONCLUSION**

Based on the foregoing facts and authority, the defendant respectfully requests that this Honorable Court reverse his conviction, and remand this matter for a new trial.

Respectfully submitted  
Charles Wilkerson

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Notice of Appeal	R. 13

COUNT OFFENSE		NAME, ADDRESS AND ZIP CODE OF DEFENDANT	
DEF. DOB AND SEX <b>7/20/55</b>		Charles Wilkerson 196 Itaska St. Mattapan, MA	
DATE OF OFFENSE <b>8/17/92</b>		OFFENSE CODE(S) <b>802/832</b>	
COMPLAINT <b>Sgt. Buckley</b>		PLACE OF OFFENSE <b>576 B.H.A. Dorch.</b>	
DATE OF COMPLAINT <b>8/18/92</b>		POLICE DEPARTMENT (if applicable) <b>DCU</b>	
RETURN DATE AND TIME <b>Arrest</b>		COUNT OFFENSE <b>a) POSS. CLASS B SUB. W/INT TO DISTRIB C94C S32A (a)</b>	

Judicial District Court of Massachusetts  
District Court Department

TO ANY AUTHORIZED OFFICER:

REASON FOR WARRANT

- ☐ Representation of prosecutor that defendant is not appear unless arrested.
- ☐ Defendant failed to appear after being summoned to appear.
- ☒ Defendant failed to appear after recognizing appear.
- ☐ Defendant failed to pay [fine] [costs] in amount of \$\_\_\_\_\_.
- ☐ Defendant failed to pay non-criminal motor vehicle fine in the amount of \$\_\_\_\_\_.
- ☐ Other: \_\_\_\_\_

not being authorized by law, did knowingly or intentionally possess with intent to manufacture distribute or dispense a controlled substance in Class "B" of G.L. c.94C, s.31, to wit: Cocaine, in violation of G.L. c.94C, s.32A.

COUNT OFFENSE
<b>b) CONSPIRACY TO VIOLATE CONTR. SUB. LAWS C94C S40</b>

did conspire with Kevin Ryner, Tuccoma Searcey, Ricardo Parks, Frantz Bessereth to violate the provisions of G.L. c.94C, to wit: Poss of cocaine w/int., in violation of G.L. c.94C, s.40.

COUNT OFFENSE
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COUNT OFFENSE
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THE COURT HAS ORDERED THAT A ☐ WARRANT ☒ DEFAULT WARRANT ISSUE AGAINST THE ABOVE DEFENDANT

Therefore you are hereby commanded to arrest the above named defendant and bring the defendant forthwith before this court to answer to the offense(s) listed above and to be dealt with according to law.

WITNESS: FIRST JUSTICE HON. JAMES W. DOLAN	C.A. 1 DATE OF ISSUE 09/30/92	CLERK/MAGISTRATE/ASST. CLERK <i>James T. Buckley</i>
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COURT DIVISION <b>Dorchester</b>		NAME, ADDRESS AND ZIP CODE OF DEFENDANT <b>Charles Wilkerson 196 Itaska St. Mattapan, MA</b>		Waived Retained <input checked="" type="checkbox"/> Assigned <b>Nelson 25-177-100</b>	
DEF DOB AND SEX <b>7/23/75</b>		OFFENSE CODE(S) <b>802/832</b>		TERMS OF RELEASE <b>300 CASH / 23000 SURETY</b>	
DATE OF OFFENSE <b>3/17/92</b>		PLACE OF OFFENSE <b>575 B.H.A. Dorch.</b>		DATE <b>5/10/93</b> PROCEEDING <input checked="" type="checkbox"/> Arraigned before J. <b>BRAN</b> <input checked="" type="checkbox"/> Advised of right to counsel <input type="checkbox"/> Advised of right to drug exam <input type="checkbox"/> Advised of right to bail review <input type="checkbox"/> Advised of right to F.I. Jury Trial <input checked="" type="checkbox"/> Waives <input type="checkbox"/> Requests F.I. Jury Trial <input type="checkbox"/> Advised of alien rights <input type="checkbox"/> Warrant issued <input checked="" type="checkbox"/> Warrant recalled <input type="checkbox"/> Default removed <input checked="" type="checkbox"/> Warrant recalled <input type="checkbox"/> Warrant issued <input checked="" type="checkbox"/> Warrant recalled <input type="checkbox"/> Default removed <input type="checkbox"/> Warrant recalled	
COMPLAINANT <b>Sgt. Buckley</b>		POLICE DEPARTMENT (if applicable) <b>DCU</b>		8/18/92 5/10/93 9/30/92 MAY 10 1993	
DATE OF COMPLAINT <b>6/18/92</b>		RETURN DATE AND TIME <b>Arrest</b>			
COUNT OFFENSE <b>a) .POSS.CLASS B SUB. W/INT TO DISTRIB C94C S32A (a)</b>					
DATE <b>MAY 10 1993</b>		PLEA <input type="checkbox"/> Not Guilty <input type="checkbox"/> Guilty <input type="checkbox"/> Nolo <input type="checkbox"/> New Plea: <input checked="" type="checkbox"/> Admits suff. facts		IMPRISONMENT AND OTHER DISPOSITION <b>2 yrs 4-c ss 5/10/95</b>	
FINDING <b>MAY 10 1993 S/K</b>		JUDGE <b>Dole</b> <b>Guilty</b>		all fees waived FINAL DISPOSITION <input checked="" type="checkbox"/> Discharged from probation <input type="checkbox"/> Dismissed at request of probation <input type="checkbox"/> Prob. fee upon DATE select <input checked="" type="checkbox"/> NO appeal	
COUNT OFFENSE <b>b) .CONSPIRACY TO VIOLATE CONTR. SUB. LAWS C94C S40</b>					
DATE <b>MAY 10 1993</b>		PLEA <input type="checkbox"/> Not Guilty <input type="checkbox"/> Guilty <input type="checkbox"/> Nolo <input type="checkbox"/> New Plea: <input checked="" type="checkbox"/> Admits suff. facts		IMPRISONMENT AND OTHER DISPOSITION <b>5-19-95</b>	
FINDING <b>MAY 10 1993 S/K</b>		JUDGE <b>Dole</b> <b>Guilty</b>		FINAL DISPOSITION <input type="checkbox"/> Discharged from probation <input type="checkbox"/> Dismissed at request of probation	
COUNT OFFENSE					
DATE		PLEA		IMPRISONMENT AND OTHER DISPOSITION	
		<input type="checkbox"/> Not Guilty <input type="checkbox"/> Guilty <input type="checkbox"/> Nolo <input type="checkbox"/> New Plea: <input type="checkbox"/> Admits suff. facts			
FINDING		JUDGE		FINAL DISPOSITION	
				<input type="checkbox"/> Discharged from probation <input type="checkbox"/> Dismissed at request of probation	
COUNT OFFENSE					
DATE		PLEA		IMPRISONMENT AND OTHER DISPOSITION	
		<input type="checkbox"/> Not Guilty <input type="checkbox"/> Guilty <input type="checkbox"/> Nolo <input type="checkbox"/> New Plea: <input type="checkbox"/> Admits suff. facts			
FINDING		JUDGE		FINAL DISPOSITION	
				<input type="checkbox"/> Discharged from probation <input type="checkbox"/> Dismissed at request of probation	
COUNT OFFENSE					
DATE		PLEA		IMPRISONMENT AND OTHER DISPOSITION	
		<input type="checkbox"/> Not Guilty <input type="checkbox"/> Guilty <input type="checkbox"/> Nolo <input type="checkbox"/> New Plea: <input type="checkbox"/> Admits suff. facts			
FINDING		JUDGE		FINAL DISPOSITION	
				<input type="checkbox"/> Discharged from probation <input type="checkbox"/> Dismissed at request of probation	

SENT TO	PURPOSE	SENT TO	PURPOSE
9/30/92	TRIAL	5/19/93	S/K
5-10-95	re		
2-16-95	S/K		
3-14-95	S/K		

DATE	TAPE NO	START	STOP
8-18-92	1099	1940	
2-16-95	0261	2596	2900
3-15-95	415	720	

I HEREBY CERTIFY THAT THIS IS A TRUE  
 COPY GIVEN UNDER MY HAND AND SEAL  
 THIS DAY OF  
  
 Clerk-Magistrate  
 CLERK-MAGISTRATE  
 ASSISTANT CLERK

DATE	DOCKET ENTRIES
8-18-92	Motions issued en
8-18-92	Cash Bail 300.00 sp
10-9-92	Bail Forfeited 300.00 sp
09/30/92	Default Warrant issued to DCU. (L.V.)
5/10/93	Def. def. ct on default warrant - warrant enclosed (JH)
5/7/93	Abstract of Motion
2-16-95	SH withdrawn court 3-14-95 STATES (JH)
5-22-95	ABSTRACT SENT (RMV)
2/15/00	Motion for New Trial; Affidavit in support of Motion; Affidavit of Defendant in support of Motion; Memorandum in support of Motion; Motion for Writ of Habeas Corpus; Certificate of Service filed by Atty. Joshua Palmer (JH)
2/29/00	Copies of paperwork sent to Judge Dolan in New Bedford Dist. Ct. (JH)
7/13/00	Motion for New Trial to be heard by Judge Dolan in Qcy. Dist Ct. to be heard 8/1/00 (JH)
7/19/00	Copies of paperwork sent to Judge Dolan at Qcy. Dist. Ct. (JH)
8/3/00	Motion denied by Judge Dolan (JH)
8-7-00	Notice of Appeal filed.
12-27-00	Notice of Assignment of Counsel sent to CPCs for Appt. of Appeal.
2/7/01	Notice of Assignment of Counsel filed - Atty. Joshua Weinberger appointed (JH)
2/15/01	Notice of Appearance; Certificate of Service filed by Atty. Joshua Weinberger (JH)

## 9207 CR 6228

Date	Docket Entries
02/15/00	Motion for New Trial Pursuant to Mass R. Crim. P. 30(b) filed.
08/03/00	Motion for New Trial Pursuant to Mass R. Crim. P. 30(b) denied by Judge Dolan.
08/07/00	Notice of Appeal filed.
01/31/01	Motion for Leave to Withdraw allowed by Judge Martin.
02/07/01	Notice of Assignment of Counsel filed.
02/15/01	Notice of Appearance filed by the Attorney.
06/14/01	Notice of Assembly of Record sent to all parties.
06/14/01	Appeal transmitted to Appeals Court.

JUN 14 2001

I HEREBY CERTIFY THAT THIS IS A TRUE  
COPY, GIVEN UNDER MY HAND AND SEAL  
THIS DAY OF

*Richard J. Dwyer*  
CLERK OF COURT  
ASSISTANT CLERK

COMMONWEALTH OF MASSACHUSETTS  
SUPREME JUDICIAL COURT FOR THE COMMONWEALTH

O R D E R

It is hereby Ordered, that the following Application for  
Further Appellate Review be denied:

FAR-12635

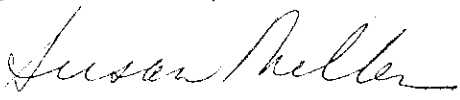
COMMONWEALTH

vs.

CHARLES WILKERSON

Dorchester District, SU No. 9207CR6228  
A.C. No. 2001-P-0795

By the Court,

  
Susan Mellen, Clerk

ENTERED: June 6, 2002

08/20/03

COMMONWEALTH OF MASSACHUSETTS  
SUPREME JUDICIAL COURT  
FOR THE COMMONWEALTH

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FAR-12635

COMMONWEALTH vs. CHARLES WILKERSON

ENTRY DATE 05/08/02	CASE STATUS FAR denied	
STATUS DATE 06/06/02	NATURE Crim: drug case	
AC DOCKET NO 2001-P-0795	AC ENT/RESC 05/01/02	CLERK DL
APPELLANT D	APPLICANT D	CV/CR CR
LEAD CASE	RELATION	OPPOSE 05/20/02
FC DOCKET NO	CITATION 437 Mass. 1103	
TRIAL JUDGE Dolan J.W.	TRIAL CT Dorchester District, SU	
TC ENTRY DATE 08/18/92	TC DOCKET NO 9207CR6228	PUBLIC y

Commonwealth  
Plaintiff/Appellee  
Active 06/15/01

Rosemary Daly, A.D.A.  
Office of the District Attorney/Suffol  
One Bulfinch Place  
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550478 Active 06/15/01 Notify

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Office of the District Attorney/Suffol  
One Bulfinch Place, 4th Floor  
Boston MA 02114  
Phone: 617-619-4087  
Fax: 617-619-4069  
561669 Active 11/13/01

Charles Wilkerson  
Defendant/Appellant  
Active 06/15/01

Joshua R. Weinberger, Esquire  
136 Warren Ave  
P.O. Box 4128  
Brockton MA 02303  
Phone: 508-587-6000  
Fax: 508-584-8165  
634477 Active 06/15/01 Notify

Dorchester District Court  
(Lower Court: criminal)  
Clerk's Office - Criminal  
510 Washington Street  
Dorchester MA 02124  
Phone: 617-288-9500  
Active 06/15/01

\* \* \* D O C K E T \* \* \*

PAPER DATE ENTRY

05/08/02 Docket opened.

08/20/03

COMMONWEALTH OF MASSACHUSETTS  
SUPREME JUDICIAL COURT  
FOR THE COMMONWEALTH

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FAR-12635

COMMONWEALTH vs. CHARLES WILKERSON

\* \* \* D O C K E T \* \* \*

PAPER	DATE	ENTRY
1.0	05/08/02	FAR APPLICATION of Charles Wilkerson, filed by Joshua R. Weinberger, Esquire.
2.0	06/06/02	DENIAL of FAR application.